Supreme Court, U.S.
FILED
AUG 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

86-238

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THOROUGHBRED RACING ASSOCIATIONS OF NORTH AMERICA, INC., et al.,

Petitioners,

vs.

ANTHONY CAPRA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEVEREUX MILBURN
2 Wall Street
New York, New York 10005
(212) 732-3200
Counsel of Record

CORRECTED COPY

DEVEREUX MILBURN
JACK KAPLAN
ROBERT N. FASS
CARTER, LEDYARD & MILBURN
2 Wall Street
New York, New York 10005
(212) 732-3200

CARL W. SHAPIRO
PAUL, HASTINGS, JANOFSKY & WALKER
1299 Ocean Avenue, 5th Floor
Santa Monica, California 90401
(213) 451-1200
Counsel for Petitioners

QUESTION PRESENTED

May civil liability be imposed under state law for the publication of true facts of public concern?

LIST OF PARTIES

The petitioners in this proceeding were defendants and appellees below: Thoroughbred Racing Associations of North America, Inc., a New York corporation; Thoroughbred Racing Protective Bureau, Inc., a New York corporation; J.B. Faulconer, Clifford W. Wickman and Paul Berube. The respondents herein were plaintiffs and appellants below: Anthony Capra, Helen Capra and Kevin Capra, formerly known as Anthony Ciulla, Helen Ciulla and Kevin Ciulla.

Petitioner Thoroughbred Racing Protective Bureau, Inc. is the wholly-owned subsidiary of petitioner Thoroughbred Racing Associations of North America, Inc. Neither of these

corporate petitioners has any other parent company, subsidiary or affiliate to list pursuant to Rule 28.1.

TABLE OF CONTENTS

QUESTION PRESENTED..... i

LIST OF PARTIES..... ii

TABLE OF CONTENTS..... iv

TABLE OF AUTHORITIES..... vi

OPINIONS BELOW..... 2

JURISDICTION..... 3

STATUTES INVOLVED..... 4

STATEMENT OF THE CASE..... 5

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Has Attempted To Limit Petitioners' Right To Publish True Statements of Public Concern..... 11

II. Petitioners Should Not Be Forced To Convince A Jury Of Their Right To Publish True Statements About Matters Of Public Concern.... 22

APPENDIX

Opinion Of The Court Of Appeals For The Ninth Circuit.. A-i

Order Of The Court of Appeals For The Ninth Circuit Denying Petition For Rehearing..... A-ix

Memorandum Decision And Order
Of The United States District
Court For The Central District
Of California..... A-xi

TABLE OF AUTHORITIES

CASES	Page(s)
Federal	
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975).....	14,15, 16
Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).....	13
Garrison v. Louisiana, 379 U.S. 64 (1964).....	16
New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....	12
Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558 (1986).....	12-13, 16
Time, Inc. v. Hill, 385 U.S. 374 (1967).....	23
Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976).....	24-25,27

California

Briscoe v. Reader's Digest Association, Inc., 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).... 14,27

Diaz v. Oakland Tribune, Inc., 139 Cal. App.3d 118, 188 Cal. Rptr. 762 (1983)..... 13-14,23, 24

Sipple v. Chronicle Publishing Co., 154 Cal. App.3d 1040, 201 Cal. Rptr. 665 (1984)..... 22-23,23-24,28-29

OTHER AUTHORITIES

Restatement (Second), of Torts, § 652D..... 23,25

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

THOROUGHBRED RACING ASSOCIATIONS OF NORTH AMERICA, INC., et al.,

Petitioners,

v.

ANTHONY CAPRA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Thoroughbred Racing Associations of North America, Inc., Thoroughbred Racing Protective Bureau, Inc., J.B. Faulconer, Clifford W. Wickman and Paul Berube respectfully pray that a writ of certiorari issue to review the judgment and

opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on April 11, 1986.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 787 F.2d 463, and is reprinted in the appendix hereto, p. A-i, infra.

The order of the Court of Appeals for the Ninth Circuit denying the petition for rehearing has not been reported. It is reprinted in the appendix hereto, p. A-ix, infra.

The memorandum decision and order of the United States District Court for the Central District of California (Hupp, D.J.) has not been

reported. It is reprinted in the appendix hereto, p. A-xi, infra.

JURISDICTION

Respondents invoked the diversity jurisdiction of the District Court pursuant to 28 U.S.C. § 1332(a). On petitioners' motion, the District Court entered summary judgment dismissing respondents' claims on November 16, 1984.

On respondents' appeal, the Ninth Circuit issued an opinion on April 11, 1986, reversing the judgment of the District Court and remanding the action for further proceedings. Petitioners thereafter filed a timely petition for rehearing, which was denied by the Court of Appeals on May 15, 1986.

The jurisdiction of this Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

First Amendment, United States Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Fourteenth Amendment, United States Constitution:

> No state shall . . . deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On July 29, 1983, petitioners issued a press release to the media.[1] The press release described an event of legitimate public concern: the discovery by the California Horse Racing Board that a racing license had unknowingly been issued to the wife of a notorious felon who had been

---

1 Petitioner Thoroughbred Racing Protective Bureau, Inc. ("TRPB"), a wholly-owned subsidiary of petitioner, Thoroughbred Racing Associations of North America, Inc. ("TRA"), is the investigative and security arm of the TRA. Among its responsibilities, the TRPB is charged with the task of detecting hidden ownership of race horses and other clandestine activities. Petitioner J. B. Faulconer is the Executive Vice President of TRA, while Petitioners Clifford W. Wickman and Paul Berube are President and Vice President, respectively, of TRPB.

convicted of fixing horse races on three separate occasions.

The press release explained that the Racing Board had originally issued the license because the applicant had used an assumed name on her license application, thereby concealing her true identity. The press release accurately described the previous exploits of the applicant's husband and reported that the Racing Board had decided to terminate the applicant's license.[2] In the course of

---

2 Anthony ("Big Tony") Ciulla was convicted of fixing horse races in 1973, 1976 and 1977. Following his last conviction, Ciulla made well-publicized appearances as a star government witness in race-fixing trials around the country. (See Declaration of Carl W. Shapiro filed in support of petitioners' motion for summary judgment in the District Court.)

the press release, both the assumed and real name of the applicant were disclosed, as well as the applicant's address, as provided on her license application.

All of the statements in the press release were true and accurate, and the applicant made no attempt to challenge the decision of the Racing Board to terminate her license. Instead the applicant, together with her

---

footnote cont'd

Ciulla also sought to aggrandize his nefarious exploits by providing a nationally-published interview to Sports Illustrated magazine in 1978, and by providing another interview for ABC-TV's nationally broadcast "20/20" television program in 1980. (See Declaration of Paul W. Berube filed in support of petitioners' motion for summary judgment.)

husband and son (collectively, respondents herein), filed a diversity action in the Central District of California, claiming that petitioners had "invaded their privacy" by issuing the subject press release.

The complaint conceded that respondents had indeed been using assumed names but alleged that those names had been provided to respondents by the federal government's witness protection program. The complaint further alleged that while petitioners' press release had accurately reported the actions of the Horse Racing Board, petitioners had wrongfully revealed respondents' true identities to the public.

The District Court dismissed the "privacy" claims upon petitioners' motion for summary judgment. The Court held that the true statements in the press release unquestionably related to an event of legitimate public concern and were therefore to be afforded the highest protection under the First Amendment.

The summary judgment was thereafter reversed by the Ninth Circuit. The Court of Appeals held that the federal government's witness protection program "possesses some social values that weigh against unlimited free speech" and that a jury should be allowed to determine the extent to which petitioners' First Amendment rights should be so limited. The

Court of Appeals further held that petitioners' constitutional right to publish true information about a matter of public concern could also be defeated if a jury were to conclude that the "intrusion" into respondents' lives was "serious" enough, or if a jury were to find that respondents had not "voluntarily exposed themselves to public notoriety."

REASONS FOR GRANTING THE WRIT

I

The Court of Appeals Has Attempted To Limit Petitioners' Right to Publish True Statements of Public Concern

This case presents the question, up to now left open by this Court, of whether true speech on matters of public concern may result in tort liability for the public disclosure of allegedly private facts in light of the constitutional protections afforded by the first and fourteenth amendments.

Until now virtually all of this Court's decisions concerning constitutional limitations on state tort law have focused on actions predicated

upon speech which was allegedly both injurious and false.[3] In such a context, this Court recently reaffirmed that "true speech on matters of public concern" lies at the heart of the protection afforded by the First Amendment and may not be the subject of tort liability. Philadelphia

---

3 For example, in considering state laws providing redress for defamation, this Court has recognized that it is often difficult (if not impossible) for the publisher of true statements to "prove" the truth of those statements in a court of law. Therefore, this Court has provided "breathing space" for those who would engage in public speech by protecting some false speech in order to make sure that true speech about matters of public concern will remain "uninhibited, robust and wide-open." Philadelphia Newspapers, Inc. v. Hepps, 106 S. Ct. 1558, 1561 (quoting New York Times Co., v. Sullivan, 376 U.S. 254, 270-272 (1964)).

Newspapers, Inc. v. Hepps, 106 S.Ct. 1338, 1365 (1986); see also, Dun & Bradstreet v. Greenmoss Builders, Inc., 105 S. Ct. 2939 (1985).

This principle should be no different, when applied to an action for invasion of privacy predicated upon true speech.

This Court has examined the constitutional limitations of the tort known as "public disclosure of private facts" on only one previous occasion.[4]

---

4 While respondents loosely styled their complaint as one for "invasion of privacy," it is clear that they were invoking only one branch of Calfiornia privacy law -- the tort known as "public disclosure of private facts." That tort has at leat four elements: (1) public disclosure (2) of a private fact (3) which would be offensive and objectionable to a reasonable person and (4) which is not of legitimate public concern. Diaz v. Oakland Tribune,

In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, (1975), it was held that civil tort liability could not be based upon the dissemination of "private" information contained in public court documents. While this Court carefully limited the scope of its decision and declined to address certain broader issues, it is apparent that the basis of the Court's holding was the conclusion that there was a

---

footnote cont'd

Inc., 139 Cal.App.2d 118, 126, 188 Cal. Rptr. 762 (1983). An additional element, proof of fault on the part of the defendant, was raised by the California Supreme Court in Briscoe v. Reader's Digest Association, Inc., 4 Cal.3d 529, 542-43, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (plaintiff must prove that defendant made disclosure "with a reckless disregard for its offensiveness").

legitimate public interest in the "private" facts disseminated in that case:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Id. at 495.

At the time Cohn was decided, this Court had expressly left open the question of whether the First Amendment requires that truth be deemed a complete defense to a

defamation action brought by a private figure. Id. at 490. That question has now been decided by Hepps, which holds that defamatory statements relating to matters of public concern are not actionable unless they are proven to be false.

Petitioners contend that the same line must be drawn in the context of the public disclosure tort. As the decisions in Cohn and Hepps suggest, no civil tort liability can be predicated on the publication of true information of public concern no matter how serious the intrusion. See also, Garrison v. Louisiana, 379 U.S. 64, 74 (1964) ("Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned").

In the present case, all of the statements made by petitioners in their press release were completely true and accurate, and respondents do not contend otherwise.

Similarly, all of the statements in the press release relate to matters of public concern: the actions of the California Horse Racing Board, a public agency of the State of California, concerning the wife of a notorious felon.

More importantly, perhaps, the precise fact which respondents would keep secret -- respondents' true identities and their use of assumed names -- itself became a matter of public concern. For it was the discovery of respondents' true identities which prompted the Racing Board to

terminate the subject license. And again, respondents do not contend otherwise. Helen Ciulla mounted no challenge whatsoever to the decison of the Racing Board to terminate her license. Nor has the propriety of that decision been attacked in the present action. Instead, petitioners are being sued merely for reporting -- accurately -- about the actions of the Racing Board and the factual background of those actions.

Petitioners therefore moved for summary judgment in the trial court, relying upon the proposition that "true speech about matters of public concern" is absolutely privileged under the first amendment and cannot be made the basis for the imposition of civil tort liability. The

District Court agreed and dismissed respondents' claims, finding the public interest in petitioners' publication was so clear that the matter was not subject to reasonable debate. See Appendix p. A-xxii - A-xxiv.

On appeal, respondents argued that the first amendment protection was not absolute and should be forfeited in this case because the public disclosure of respondents' true identities frustrated the goals of the federal government's witness protection program and the "privacy" which that program was designed to provide. While it seems doubtful that one of the goals of the witness protection program was to provide Helen Ciulla with the means to conceal her true identity from state racing

authorities when applying for a horse-racing license, the Ninth Circuit apparently agreed with respondent's contention. The Court held that petitioners' constitutionally protected right to publish true speech about public matters was not unlimited and would have to be "weighed" against certain competing interests.

Specifically, the Ninth Circuit authorized a jury to consider whether the public interest in petitioners' publication was sufficient enough to outweigh and overcome (1) any injury to the "social values" fostered by the witness protection program; (2) the degree of intrusion into respondents' "private" lives; and (3) respondents' purported reluctance to "[expose] themselves to public notoriety."

Even the Ninth Circuit, however, grudgingly acknowledged the public interest in the events described in petitioners' press release:

> Within the horse racing universe, all of these facts, if known, would be noteworthy if not newsworthy.

Appendix, p. A-iv.

By holding that petitioners' right to publish true speech of public concern may be curtailed, the Court of Appeals has effectively broken down the doors to the inner sanctum of the First Amendment. Indeed, the decision of the Ninth Circuit cannot be reconciled with the previous decisions of this Court and represents a dangerous precedent in the evolution of the public disclosure tort.

II

Petitioners Should Not Be Forced To Persuade A Jury About Their Right To Publish True Statements Of Public Concern

Mindful of the special protection which the First Amendment affords "speech that matters," a number of California courts have previously recognized that the public disclosure of an allegedly private fact cannot be actionable if there is a legitimate public interest in the information so disclosed. As one court recently stated:

> When the subject-matter of the publicity is of legitimate public concern, there is no invasion of privacy.

Sipple v. Chronicle Publishing Co., 154 Cal. App.3d 1040, 1046, 201 Cal. Rptr. 665 (1984) (quoting Restatement (Second) of Torts, S 652D, comment d) (publication revealing homosexual orientation of citizen who may have saved President's life held newsworthy and privileged as a matter of law). That "legitimate public concern" is frequently referred to as the "newsworthiness" of the publication, see Diaz v. Oakland Tribune, Inc., 139 Cal. App.3d 118, 130, 188 Cal.Rptr. 762 (1983), cf., Time, Inc. v. Hill, 385 U.S. 374 (1967), and a "newsworthy" disclosure is deemed to be nonactionable, no matter how offensive the disclosure may be.

> It certainly must be recognized that an otherwise embarrassing article may be newsworthy, depending on the

> circumstances. Only when the embarrassing publicity is not newsworthy can plaintiff recover damages, consistent with defendants' rights of free speech and press.

Diaz, supra, 139 Cal. App.3d at 130 (emphasis in original). Accord, Sipple, supra, 154 Cal.App.3d at 1046 ("even a tortious invasion of one's privacy is exempt from liability if the publication of private facts is truthful and newsworthy").

Only when there is no legitimate public interest whatsoever in the disclosure will an action properly lie.

> The line is to be drawn when the publicity ceases to be the giving of information to which the public is entitled, and becomes a morbid and sensational prying into private lives for its own sake, with which a reasonable member of the public, with decent standards, would say that he had no concern.

Virgil v. Time, Inc., 527 F.2d 1122, 1129 (9th Cir. 1975), cert. denied, 425 U.S. 998 (1976) (quoting Restatement (Second) of Torts, § 652D, comment f) (details of renowned body surfer's idiosyncratic private behavior not necessarily matter of public concern).

The conclusion in the present case that there was a legitimate public interest in the precise facts disclosed by petitioners should have been the end of the inquiry, as the District Court properly held. Instead, the Court of Appeals held that the quantum of public concern in petitioners' publication must now be "weighed" by a jury to determine whether petitioners' First Amendment right to publish "true speech about

public matters" is sufficient to overcome whatever public or private interests might exist in preserving the secrecy of respondents' concealed identities.

The Ninth Circuit was apparently misled by a three-part "test" for "newsworthiness" discussed in certain California cases. That "test," which would appear on its face to "weigh" the public interest in the disclosed fact against the plaintiff's right of privacy on an ad hoc basis, would plainly be unconstitutional if it were so applied.

California courts, however, have applied the "test" only in those situations where the disclosed "private" fact is not in itself newsworthy but bears some rational relationship

to other facts which are of legitimate public concern. Under such circumstances, the "test" has been used to aid in the determination of whether the relationship between the "private" fact and the newsworthy event is substantial enough to outweigh the privacy interests involved. See, e.g., Briscoe v. Reader's Digest Association, Inc., 4 Cal.3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971) (facts of eleven-year-old crime conceded to be newsworthy, but identity of perpetrator no longer in itself newsworthy). Cf. Virgil, supra (plaintiff's body-surfing exploits conceded to be newsworthy, but "private" incidents purportedly illustrating plaintiff's dare-devil character not in themselves newsworthy).

In the present case, however, the disclosure of the "private" fact -- respondents' concealed identities -- was itself unquestionably newsworthy because that disclosure formed the very basis of a decision by the California Horse Racing Board. Therefore, the First Amendment should provide an absolute shield against liability. This point was made clear by a recent decision of the California Court of Appeal:

> While it has been said that the general criteria for determining newsworthiness are (a) the social value of the facts published; (b) the depth of the article's intrusion into ostensibly private affairs; and (c) the extent to which the individual voluntarily acceded to a position of public notoriety. . ., the cases and authorities further explain that <u>the paramount test of newsworthiness is whether the matter is of legitimate</u>

> public interest. . . (emphasis added).

Sipple, supra, 154 Cal. App.3d at 1048 (public interest in newsworthy event requires granting of summary judgment despite plaintiff's great distress about public disclosure of his homosexual orientation).

If allowed to stand, the decision of the Ninth Circuit will pose a dangerous threat to "speech that matters." Henceforth, those who would engage in truthful speech about public matters will need to be concerned that a jury might one day conclude that their right to engage in such public speech is less important than the interest of others in silencing such speech.

This cannot be the law. If this Court has meant what it has said in the past, the First Amendment provides more than a limited, defeasible right to speak truthfully about public matters. The decision of the Court of Appeals must therefore be reversed and the judgment of the District Court reinstated.

CONCLUSION

For the reasons stated above this petition for certiorari should be granted.

Dated: New York, New York
August 13, 1986

DEVEREUX MILBURN
2 Wall Street
New York, New York 10005
(212) 732-3200

Counsel of Record

DEVEREUX MILBURN
JACK KAPLAN
ROBERT N. FASS
CARTER, LEDYARD & MILBURN
2 Wall Street
New York, New York 10005
(212) 732-3200

CARL W. SHAPIRO
PAUL, HASTINGS, JANOFSKY & WALKER
1299 Ocean Avenue,
Santa Monica, California
90401
(213) 451-1200

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY CAPRA, HELEN CAPRA and KEVIN CAPRA, Plaintiffs-Appellants, v. THOROUGHBRED RACING ASSOCIATION OF NORTH AMERICA, INC., THOROUGHBRED RACING PROTECTIVE BUREAU, INC., J.B. FAULCONER, CLIFFORD WICKMAN, and PAUL BERUBE, Defendants-Appellees.	NO. 84-6609 DC No. CV84-1207-HLH OPINION

Appeal from the United States District Court for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted December 2, 1985
Pasadena, California

Before: GOODWIN and NELSON, Circuit Judges, and SCHWARZER,[1] District Judge.

---

1 The Honorable William W. Schwarzer, District Judge, United States District Court for the Northern District of California sitting by designation.

PER CURIAM:

The Capra family sued for damages arising out of the publication of their true identities, which had been concealed by the federal witness protection program. Jurisdiction in the district court was based solely on diversity of citizenship. They appeal the district court's decision on summary judgment that the information published was newsworthy. We reverse and remand for further proceedings.

Anthony Ciulla was convicted of a federal offense for fixing horse races. He probably became newsworthy at the time. In exchange for his testimony, he was allowed to participate in the federal witness protection

program. Under this program, he was given a new name (Capra, instead of Ciulla), with corresponding documents, and resettled in a new location. His wife Helen and his son Kevin received similar treatment. He alleges that large sums of money were offered by organized crime figures for information disclosing Anthony Ciulla's new identity and whereabouts.

Helen Capra applied for an open claiming license from the California Horse Racing Board under her new name. If granted, the license would have allowed her to race and "claim" (purchase in claiming races) horses throughout California. As part of the application, she provided her assumed name and her new address. Helen applied on behalf of her son,

Kevin, and alleged that she acted independently of Anthony. She did not disclose that her new name was assumed. Within the horse racing universe, all of these facts, if known, would be noteworthy if not newsworthy.

An investigation by the defendant Thoroughbred Racing Protective Bureau, Inc., a wholly-owned subsidiary of the defendant Thoroughbred Racing Association of North America, Inc., revealed that Helen Capra had formerly been Helen Ciulla. Her application was denied. The Thoroughbred Racing Association issued a press release revealing Helen and Anthony Capra's former identity and location. Kevin Capra was not mentioned in the press release.

Kevin, Anthony, and Helen sued for invasion of privacy. The Capras concede that the facts stated in the news release are true, although they disagree with the release's implication that Anthony was acting through Helen. The district court granted summary judgment for the defendants against all plaintiffs on the theory that the information distributed was newsworthy.

The parties agree that California law governs. The tort of invasion of privacy in California has four elements: (1) public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to a reasonable person and (4) is not newsworthy. See, e.g., Virgil v. Time, Inc., 527 F.2d 1122, 1125-26 (9th Cir.

1975), cert. denied, 425 U.S. 998 (1976). Defendants conceded for the purposes of this motion are [sic] triable issues of fact remain as to the first three issues.

Later California cases have elaborated Virgil's requirement of newsworthiness into a three-part standard, ordinarily requiring the jury to weigh: (1) the social value of the facts published, (2) the depth of the publication's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily assumed a position of public notoriety. Diaz v. Oakland Tribune, Inc., 139 Cal. App. 3d 118, 132, 188 Cal. Rptr. 762, 772 (1983); Sipple v. Chronicle Publishing Co., 154 Cal. App. 3d 1040, 1048, 201 Cal. Rptr. 665, 669-70 (1984).

On the record before us, a reasonable jury, applying the three-part standard, could find that the press release was not newsworthy as to one or more of the plaintiffs. First, the jury must consider the social value of the facts published in light of the public's interest in protecting persons willing to testify. This concern was not present in Virgil. While the federal witness protection program cannot by itself overcome the First Amendment, the program possesses some social values that weigh against unlimited free speech under the general balancing test of Virgil and subsequent cases. Second, the jury must consider the seriousness of the intrusion caused by the publication. Finally, the jury must

consider the extent to which parties voluntarily exposed themselves to public notoriety. In this respect, Anthony, who was convicted, his wife Helen, who made the application, and their son Kevin, whose name was placed on the application, are nor all similarly situated.

REVERSED and REMANDED.

Filed April 11, 1986

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY CAPRA, HELEN CAPRA and KEVIN CAPRA, Plaintiffs-Appellants, v. THOROUGHBRED RACING ASSOCIATION OF NORTH AMERICA, INC., THOROUGHBRED RACING PROTECTIVE BUREAU, INC., J.B. FAULCONER, CLIFFORD WICKMAN, and PAUL BERUBE, Defendants-Appellees.	NO. 84-6609 DC No. CV84-1207-HLH ORDER

Appeal from the United States District Court for the Central District of California
Harry L. Hupp, District Judge, Presiding

Before: GOODWIN and NELSON, Circuit Judges, and SCHWARZER,[6] District Judge.

---

6 The Honorable William W. Schwarzer, United States District Judge, Northern District of California, sitting by designation.

The panel has voted to deny the petition for rehearing and disregard the suggestion for rehearing en banc, which does not comply with rules.

The petition for rehearing is denied and the suggestion for rehearing en banc is disregarded.

Filed May 15, 1986

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTHONY CAPRA, et al., Plaintiffs, vs. THE THOROUGHBRED RACING ASSOCIATIONS OF NORTH AMERICA, INC., etc., et al., Defendants.	NO. CV 84-1207-HLH STATEMENT OF UNCONTROVERTED FACTS AND CONCLUSIONS OF LAW AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In this diversity court action alleging a violation of the right of privacy, three plaintiffs bring suit for damages. Both defendants and plaintiffs have moved for summary judgment. The motions were submitted on October 1, 1984. Defendants' motion for summary judgment will be granted. Plaintiffs' motion for summary judgment is denied.

The uncontroverted facts are as follows:

Plaintiffs, suing under the assumed surname "Capra," formerly used their original name "Ciulla." Plaintiffs Anthony and Helen Capra are husband and wife. Their son is Kevin Capra, the other plaintiff. Diversity of citizenship exists and the Court has jurisdiction. The defendants are The Thoroughbred Racing Associations of North America, Inc., Thoroughbred Racing Protective Bureau, Inc., and various officers and board members of the two corporations.

Plaintiff, Anthony Capra, was convicted three times of fixing horse races in the 1970s under the name Ciulla. Following his convictions, Mr. Capra agreed to testify in

various criminal proceedings in which other persons were charged with fixing horse races. Between 1978 and 1982, Mr. Capra, still using the name Ciulla, testified on numerous occasions against many persons charged with the fixing of horse races. Various governmental entities obtained numerous convictions based in whole or in part upon Mr. Capra's testimony.

As a result of his services to the prosecution authorities in the various cases, Mr. Capra, his wife and son were allowed to enter the federal government's "Witness Protection Program." New identities under the name "Capra" were provided to the family in place of the former identity "Ciulla." The newly denominated Capra family moved to California and settled in

Malibu under their new names. Prior thereto, the Capra family had had no particular or lengthy association with California.

Mr. Capra, referred to as Ciulla, in 1978 was the subject of a nationally published article in Sports Illustrated magazine in which his career as a fixer was described in detail. Mr. Capra, using the name Ciulla, in 1980 allowed himself to be interviewed on a nationwide broadcast on ABC's "Twenty/Twenty" program, wherein he described his past horserace-fixing activities.

Between 1972 and 1980, numerous newspaper and magazine articles recounted the various trials of Mr. Ciulla, and the various trials in which he was a witness. During the

said period of time, Mr. Capra, under the Ciulla name, was the subject of intense newspaper publicity. As a result of the criminal activities of which Mr. Capra was convicted and in the trials in which he was thereafter a witness, Mr. Capra, under the name of Ciulla, became well known in nationwide horseracing circles.

In July 1983, plaintiff Helen Capra applied for an open claiming license with the California Horse Racing Board and received a temporary license. Thereafter, defendants determined that Helen Capra was in fact the wife of Anthony Capra and that Anthony Capra was in fact Anthony Ciulla. Defendants took steps to notify the California Horse Racing Board of that fact.

On or about July 29, 1983, the California Horse Racing Board terminated the temporary license of Helen Capra.

On July 29, 1983, following the termination of the license of Helen Capra, the defendants caused to be published a press release, intending that the facts stated in the press release be covered by news media interested in the horse racing world. The press release stated the new Capra identity of the former Ciulla family, summarized Mr. Capra's history of convictions and testimony under the name of Ciulla, recited the application for a license by Helen Capra and the defendants' part in revealing the former identity of Mr. and Mrs. Capra to the California Horse Racing Board. The

article also stated that Malibu was the place of residence of the Capra family. The Capras' son Kevin was not named in the press release.

Plaintiffs bring suit for damages for invasion of the right of privacy.

In California, whose law is applicable, the elements of the tort of invasion of privacy are (1) a public disclosure, (2) of a private fact, (3) which would be offensive and objectionable to the reasonable person, and (4) which is not of legitimate public concern (sometimes referred to as lack of "newsworthiness"). (Diaz v. Oakland Tribune, Inc. (1983) 139 Cal. App. 3d 118, 126; Sipple v. Chronicle Pub. Co. (1984) 201 Cal. Rptr. 665, 667, ___ Cal. App.3d ___; cf. Briscoe

v. Readers Digest Association (1971) 4 Cal. 3d 529.)

With respect to plaintiffs' motion for summary judgment, the uncontradicted facts set forth above, require the denial of plaintiffs' motion for judgment. Plaintiffs' motion for summary judgment is denied.

With respect to defendants' motion for summary judgment, defendants concede for purposes of the motion that there are triable issues of fact with regard to the first three elements of the tort. Defendants' motion is premised on the contention that as a matter of law, under the undisputed facts set forth above, the items reported in the news release were "newsworthy." Defendants' motion is well taken and must be granted.

Lack of newsworthiness, as an element of plaintiffs' right of privacy case, is required by First Amendment considerations. (Briscoe v. Readers Digest Association, supra, at pp. 534-536.) It follows, therefore, that the truthful reporting of newsworthy facts cannot be challenged in a right of privacy suit, however much privacy is otherwise desirable to the plaintiff and to the public interest as embodied, here, by the Witness Protection Act treatment received by plaintiffs.

In general, newsworthiness is a fact question for a jury. In determining newsworthiness, the jury is to weigh the following considerations: (1) the social value of the facts published, (2) the depth of the

article's intrusion into ostensibly private affairs, and (3) the extent to which the party voluntarily assumed a position of public notoriety. (Diaz v. Oakland Tribune, Inc., supra, at p. 132; Sipple v. Chronicle Pub. Co., supra, _____; Briscoe v. Readers Digest Association, supra, at p. 541; Virgil v. Time, Inc. (9th Cir. 1975) 527 F.2d 1122, 1129.)

If the undisputed facts set forth above can give rise to differing evaluations under the standards set, the matter is for the jury and cannot be decided on summary judgment.

The Court is convinced that the matter is too clear to be submitted to a jury. There can be no doubt that Anthony Ciulla's past history remains newsworthy. The history

is too new, too fresh, and received too intensive publicity for Mr. Ciulla under that name to have attained the status postulated by the Supreme Court in the Briscoe case where he "had once again become an anonymous member of the community" (Briscoe, at p. 541). However, this does not end the matter. While Mr. Capra's past history must be said to be newsworthy when related to the name Ciulla, it does not follow from the past history alone that his present identity under the name of Capra, and his present community of residence, were, based on the past history alone, a newsworthy matter. Indeed, a reasonable argument can be made to the contrary: that a person given a new identity under the federal witness program has reasonable claims

not to have that identity revealed, even though the past history under the former name is still newsworthy. Were that all there was to the case, the summary judgment would be denied.

Plaintiffs' problem is that there is more to the case. Mrs. Capra, in her own name, applied for a horserace-related public license. Her identity was revealed by defendants to the licensing authority, who terminated her provisional license. The reason for terminating the license was Mr. Ciulla's previous invidious connection with the horse racing industry. These are public facts, dealing with a contemporary event, and are a clear epilogue to the newsworthy Ciulla story. The past history of the newsworthy Ciulla history makes the

denial of Mrs. Capra's license also newsworthy. Helen Capra's involvement in the story, innocent as it may have been of past wrongdoing, is nevertheless intimately tied up with Mr. Ciulla's past history. It seems clear from the cases that one may be innocently and unintentionally involved in a newsworthy event but nevertheless be subject to publicity because of connection with the newsworthy event. (Sipple v. Chronicle Pub. Co., supra, at p. __; Virgil v. Time, Inc., supra, at p. 1129; Time, Inc. v. Hill (1967) 385 U.S. 374, 384.) Accordingly, insofar as Mrs. Capra's otherwise innocent past, without more, might enable her to maintain this action, her connection with Mr. Capra in the light of the newsworthy event involving her

is fatal to her case. Kevin Capra's name is not mentioned in the press release.

It is the Court's determination that there is no triable issue of fact with regard to the question of newsworthiness; as a matter of law on the undisputed facts set forth above, the item reported by defendants to the press is "newsworthy."

This memorandum is the Statement of Uncontroverted Facts and Conclusions of law. Judgment for the defendants is signed contemporaneously herewith.

DATED: November 13, 1984

s/ Harry L. Hupp
HARRY L. HUPP
United States District Judge

Entered November 16, 1984